STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE LONGUSKI and NIEL NIELSON, Personal Representative of the Estate of FLORENCE LONGUSKI, Deceased,

Plaintiffs-Appellees,

and

BLUE CROSS BLUE SHIELD,

Intervening Plaintiff-Appellee,

v

HOON KYO JEUNG, M.D., and H. K. JEUNG, M.D. CO., P.C.,

Defendants-Appellants,

and

HILLS & DALES HOSPITAL,

Defendant.

UNPUBLISHED
April 15, 2008

No. 274990
Tuscola Circuit Court
LC No. 02-021062-NH

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

In this medical malpractice case, defendants Dr. Hoon Kyo Jeung and H. K. Jeung, M.D. Co., P.C., appeal as of right from a judgment awarding plaintiffs $234,200, following a jury trial.[1] Because there was an evidentiary basis provided by plaintiff[2] to allow the jury to estimate

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[1] Intervening plaintiff Blue Cross Blue Shield of Michigan ("BCBSM") filed a complaint on January 6, 2004, to recover medical expenses under the subrogation clause of plaintiffs' policy. Pursuant to the parties' stipulation, an order was entered on November 22, 2006, dismissing BCBS's complaint pursuant to an agreement whereby plaintiffs would pay BCBS $25,000 in full
(continued…)

the amount of damage caused by Dr. Jeung's alleged malpractice, and because there was evidence that Dr. Jeung's malpractice deprived plaintiff of a greater than 50 percent opportunity to achieve a better result, defendants were not entitled to a directed verdict or a judgment notwithstanding the verdict, we affirm.

I

Plaintiffs Lawrence Longuski and his wife Florence[3] brought this medical malpractice action against defendants and Hills & Dales General Hospital on June 20, 2002. According to plaintiff's medical record, he was diagnosed in July 1999 with gastroesophageal reflux disease (GERD), after suffering from difficulty swallowing, feeling like he had an obstruction, and vomiting after eating. An upper GI showed that plaintiff had small slighting hiatal hernia. Plaintiff was prescribed Prilosec, which blocks the production of acid in the stomach. On June 12, 2000, plaintiff complained of nausea and vomiting and the inability to keep food down. Plaintiff's treating physician, Dr. Arshad Quddoos, a board certified internist, referred plaintiff to defendant Dr. Jeung for an endoscopy. During the endoscopy, Dr. Jeung found a piece of chicken or a chicken bone stuck in plaintiff's esophagus and pushed it down into the stomach. Dr. Jeung also dilated plaintiff's esophagus. In his endoscopy report, Dr. Jeung opined that plaintiff's "condition was getting worse."

Dr. Jeung performed surgery on plaintiff on June 21, 2000. Plaintiffs' complaint alleges that Dr. Jeung "performed a repair of hiatus hernia, Nissen Fundoplication and parietal cell vagotomy surgery." After the surgery, plaintiff allegedly "developed complications including abdominal pain, tachypnea, tachycardia and disphoresis," and x-rays showed "a large amount of free intra abdominal air." Plaintiff was later hospitalized and was found to have "a necrotic distal esophagus, fundus and cardia of the stomach with perforations of the distal esophagus and proximal stomach." Additional surgery was required, "in which the distal esophagus was divided and left as a blind pouch and the antrum of the stomach was also divided. The necrotic piece of stomach was removed and a cervical esophagostomy was performed." Plaintiff was placed on a ventilator, and further surgery found and repaired a "perforation at the gastric staple line."

Plaintiffs' complaint alleges that Dr. Jeung committed malpractice by (a) failing to take a thorough and complete history and physical examination, (b) failing to thoroughly and properly perform a patient work-up prior to surgery, (c) failing to treat plaintiff conservatively, (d) failing to "avoid performing a parietal cell vagotomy that is not indicated," (e) failing to "avoid performing a Nissen Fundoplication and parietal cell vagotomy surgery simultaneously," (f) failing to properly perform the surgery to "avoid devascularizing" plaintiff's stomach, (g) failing

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settlement of its lien once a judgment in plaintiffs' favor became final. BCBS is not directly involved in this appeal.

[2] Because Florence Longuski's claims are derivative, the singular term "plaintiff" shall refer to plaintiff Lawrence Longuski only.

[3] Florence has since died and Niel Nielson was substituted as a party to pursue this action as personal representative of her estate.

to properly manage plaintiff's care pre, intra, and post-operatively, (h) failing to perform the surgery without perforating plaintiff's esophagus and stomach, and (i) failing to diagnose and treat post-operative complications, including but not limited to the perforation of plaintiff's esophagus and stomach.

At trial, Dr. Jeung testified that prior to surgery he spoke to plaintiff and his wife for almost an hour, explaining plaintiff's medical condition and showing them pictures to better their understanding. Dr. Jeung testified that he took plaintiff's history, and learned that plaintiff had suffered abdominal pain, vomiting, and then feeling better afterward. Dr. Jeung explained that he told plaintiff that he could do a conservative treatment with medication or he could have surgery. The primary surgery was the Nissen Fundoplication, and Dr. Jeung would "add a parietal cell vagotomy." Dr. Jeung also explained that he did not earn anything extra for the second surgery, it was entirely for "patient care." Dr. Jeung denied that the parietal cell vagotomy jeopardized the blood flow to the stomach. He acknowledged that the combination of the two surgeries was not common, but he had done them together several times in the past.

The jury returned a verdict for plaintiff, finding that Dr. Jeung's professional negligence was a proximate cause of the injury or damage to plaintiff. The trial court entered judgment awarding plaintiffs $234,200.[4] Defendants moved for a new trial or judgment notwithstanding the verdict, challenging the qualifications of plaintiff's expert, and the lack of evidence that there was more than a 50 percent loss of opportunity to achieve a better result. The trial court denied defendants' motion and this appeal followed.

II

When reviewing a trial court's decision on a motion for a directed verdict, the standard of review is de novo and the reviewing court must consider the evidence in the light most favorable to the nonmoving party. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006). A motion for a directed verdict should be granted only if the evidence fails to establish a claim as a matter of law. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). The standard of review for JNOV similarly requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. A motion for JNOV should be granted only if the evidence so viewed fails to establish a claim as a matter of law. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Badalamenti v Beaumont Hosp*, 237 Mich App 278, 284; 602 NW2d 854 (1999). If the evidence is such that reasonable minds could differ, the question is one for the jury and judgment notwithstanding the verdict is improper. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

III

Defendants sole argument on appeal is that the trial court erred in denying defendants' motion for a directed verdict and post-trial motions for judgment notwithstanding the verdict

[4] $103,733.17 of this amount was allocated to medical expenses.

(JNOV) or new trial because the requirements of MCL 600.2912a(2) apply and plaintiffs' expert provided no evidence that Dr. Jeung's alleged malpractice deprived plaintiff of a greater than 50 percent opportunity to achieve a better result. "To prove medical malpractice, a plaintiff must show that the defendant's negligence proximately caused the plaintiff's injuries." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 476-477; 633 NW2d 440 (2001). The plaintiff bears the burden of proving (1) the applicable standard of care, (2) breach of that standard by the defendant, (3) injury, and (4) proximate causation in a medical malpractice claim. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). And, MCL 699.2912a(2) provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

At trial, plaintiffs argued that Dr. Jeung was negligent for performing both the Nissen Fundoplication and the parietal cell vagotomy at the same time. There is no dispute that both surgeries were properly performed. Thus, the question is not whether Dr. Jeung violated the standard of care by performing surgery, but whether he violated the standard of care by performing the parietal cell vagotomy at the same time as the Nissen Fundoplication. Stated more specifically, when applying MCL 699.2912a(2), did Dr. Jeung's performance of the parietal cell vagotomy at the same time as the Nissen Fundoplication deprive plaintiff of a greater than 50 percent opportunity to achieve a better result.

Here, the injury was that plaintiff's stomach was destroyed as a result of Dr. Jeung's allegedly unnecessary surgical procedure, which led to other surgeries and treatment. There was evidence that plaintiff should have been treated for his ulcer condition with medication for several months before any ulcer surgery was considered, and that it was a violation of the standard of care not to do so. At trial, plaintiffs' expert, Dr. Steven Swartz, M.D., testified in particular that the Nissen Fundoplication was appropriate to treat plaintiff's reflux condition, but that plaintiff's ulcer condition should have been treated with medication rather than with the parietal cell vagotomy. Dr. Swartz specifically testified on direct examination that "through reasonable medical certainty" plaintiff "*would not have*" suffered ischemia and necrosis if Dr. Jeung had not done both the Nissen Fundoplication and the parietal cell vagotomy at the same time. In other words, if we are to measure plaintiff's opportunity to achieve a better result by comparing plaintiff's initial opportunity with the opportunity that remained as a result of defendant's malpractice, Dr. Swartz's testimony provides reference points of 0% to 100%, clearly more than the 50% required by MCL 699.2912a(2).

Defense cross-examination of Dr. Swartz did not establish that this testimony on direct examination was false or misstated. And defendant never qualified or repudiated his earlier testimony. Further, there was no motion to strike Dr. Swartz's testimony from the record on any ground. Thus, the evidence was properly submitted as a question of fact for the trier of fact. It is the province of the jury to weigh the competing testimony and to decide which expert to believe. See *Detroit v Larned Associates*, 199 Mich App 36, 41; 501 NW2d 189 (1993). Hence, if accepted by the trier of fact, Dr. Swartz's unambiguous testimony that plaintiff's ischemia and necrosis simply would not have occurred but for Dr. Jeung's negligence in performing both

surgeries at the same time, necessarily establishes the loss of opportunity required by MCL 699.2912a(2).

IV

Because there was an evidentiary basis provided by plaintiff to allow the jury to estimate the amount of damage caused by Dr. Jeung's alleged malpractice, and because there was evidence that Dr. Jeung's malpractice deprived plaintiff of a greater than 50 percent opportunity to achieve a better result, defendants were not entitled to a directed verdict or a judgment notwithstanding the verdict. We need not render an opinion on plaintiff's argument that this case is not a lost opportunity case because plaintiff did not die and therefore, the requirements of MCL 600.2912a(2) do not apply, for the reason that it is moot because MCL 699.2912a(2) is satisfied under the facts presented in the record.

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis